Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1059

JOHN N. MITCHELL, *Petitioner*

v.

BERTRAM ZWEIBON, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

BERTRAM ZWEIBON, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John N. Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed an order of the district court dismissing a civil action against him for alleged violations of Title III of the Omnibus Crime Control and Safe Streets

Act of 1968 and the Fourth Amendment to the United States Constitution.[1]

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F.2d 594. The opinion of the District Court is reported at 363 F.Supp. 936.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1975 (App. A., *infra,* pp. 1a) and the Court of Appeals denied rehearing *en banc* on August 29, 1974 (App. B., *infra,* pp. 3a). By order dated November 17, 1975, the Chief Justice extended the time for filing a petition for writ of certiorari to and including January 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the President of the United States in the exercise of his constitutional authority to conduct the Nation's foreign affairs may lawfully authorize warrantless electronic surveillances in aid of this responsibility, where the information sought is deemed essential to the security of the United States or deemed essential to protect the Nation and its citizens from the hostile acts of a foreign power.

2. Whether Congress intended the civil damages provision of Title III of the Omnibus Crime Control

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[1] As is set forth *infra* at pp. 10-11, the petitioner believes this case not to be ripe for an application for a writ of certiorari at this point, but has cross-petitioned solely to preserve for review questions which the Court should consider if it grants the petition for a writ of certiorari in this action by Bertram Zweibon, *et al.*

and Safe Streets Act, 18 U.S.C. §§ 2510-2520, to apply to electronic surveillances conducted pursuant to the foreign relations powers of the President of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Fourth Amendment and of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, *et seq.*, are set forth in the appendix to the petition for a writ of certiorari filed in this action by the plaintiffs below, Bertram Zweibon, *et al.*

STATEMENT OF THE CASE

This action was instituted on October 7, 1973, by sixteen members of the Jewish Defense League (JDL) against the then Attorney General of the United States, John N. Mitchell, and nine Special Agents and employees of the Federal Bureau of Investigation. The suit followed the disclosure by the government in the consolidated criminal cases, *United States* v. *Bieber, et al.*, 71 CR 479 (E.D.N.Y.) and *United States* v. *Joffee, et al.*, 71 CR 480 (E.D.N.Y.), that conversations of certain defendants and counsel therein, six of which are plaintiffs in this action, had been overheard during a tap of the phones of the Jewish Defense League in New York City. The Complaint alleged that the telephones of the offices of the Jewish Defense League had been the subject of an electronic surveillance conducted by the defendants from October 1, 1970 until October 31, 1970 and again from January 5, 1971 until June 30, 1971, and that their conversations had been overheard on this surveillance during calls

placed by them to and from these telephones. It was asserted that the telephone tap was violative of the Fourth Amendment and 18 U.S.C. §§ 2510-2520 and 42 U.S.C. §§ 1983 and 1985.

The defendants' answer admitted the electronic surveillance of the Jewish Defense League offices and it was subsequently admitted that the plaintiffs herein had been overheard, but it was also asserted that such surveillance was lawful and not violative of any constitutional or statutory provisions in that the taps were authorized by the President, acting through the Attorney General, in the exercise of his authority relating to the Nation's foreign affairs and was deemed essential to protect the Nation from hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the security of the United States.

The surveillances which form the basis for this litigation arose out of the JDL's activities in 1970 and 1971 against offices and personnel of the Soviet Union. These activities included vandalism to Soviet institutions, threats against Soviet officials, physical assaults on Soviet personnel, and the bombings of the Soviet Embassy building and the Soviet Amtorg Trading Corporation. The actions precipitated strong protests from the Soviet government, coupled with warnings that such activities jeopardized U.S.-U.S.S.R. relations and, further, may result in retaliation against American personnel and offices in Moscow. Evaluating the situation, the State Department, on two occasions, advised the FBI of that Department's opinion that the JDL-directed violence would have a damaging effect on relations with the U.S.S.R. and could

precipitate reprisals against American citizens in Moscow.

In a memorandum for the Attorney General dated September 14, 1970, the Director of the FBI requested that a surveillance of the telephone of the JDL headquarters be authorized during the month of October, 1970 on the occasion of the 25th session of the General Assembly of the United Nations. The Director advised the Attorney General that the JDL has demonstrated a proclivity for demonstrations and violence in the form of attacks on Soviet and Arab diplomatic installations in this country, as well as by participation in demonstrations in New York City, which resulted in injury to private citizens and law enforcement officers. The Director pointed out the concern of the White House that utmost security be afforded to foreign dignitaries visiting New York City and that a surveillance of the telephone of JDL headquarters could provide advance knowledge of any activities of JDL causing international embarassment to this country. This first authorization was approved by the then Attorney General, petitioner John N. Mitchell, on September 15, 1970.

On January 4, 1971 the Director of the FBI advised the Attorney General that activities by members of the JDL had taken the form of demonstrations targeted against Soviet diplomatic installations, protesting the treatment by the Soviet Government of the Jewish population in Russia; that the demonstrations had been the subject of numerous official protests by the Soviet Government alleging harrassment of Soviet personnel and failure on the part of the United States Government to provide adequate protection and secur-

ity for members of the Soviet diplomatic community in this country; that the renewed tensions in the Middle East and recent decisions by Soviet Courts directed against Soviet Jews had resulted in increased demonstrations against Soviet diplomatic installations throughout the world; and that a surveillance of the telephone of JDL headquarters could be expected to provide advance knowledge of activities of the group directed against diplomatic establishments, which could cause international embarrassment to the United States. This second authorization to conduct a surveillance was approved by the Attorney General on January 4, 1971.

On March 31, 1971 the Attorney General approved the continuation of the previously authorized electronic surveillance of the telephone of the headquarters of the JDL for a three-month period effective April 4, 1971 upon the representation of the Director of the FBI that:

> During the past three months, the authorized surveillance has continued to reveal details of plans by the Jewish Defense League (JDL) to continue its program of harrassment of Soviet and Arab bloc diplomats in New York City and Washington, D. C. In each instance the installation furnished otherwise unobtainable information well in advance of public statements by the JDL, thereby allowing for adequate counter-measures to be taken by appropriate police and security forces.

Prior to his first authorization on September 15, 1970 for the electronic surveillance of the telephone at JDL headquarters, the Attorney General had conversations with the Director of the FBI as well as a number of other people in the National Security Council and

the Department of State concerning the impact of JDL activities on the foreign policy of this country based on JDL actions in 1969 and 1970. The Attorney General was aware of the representations made by the Soviet Government to this country that the United States had failed to provide adequate protection to the diplomatic installations of the Soviet Government in this country and that there was a possibility of retaliation against American diplomats in Moscow as a result of the activities of the JDL.

In authorizing the electronic surveillance, the Attorney General relied on the total knowledge received from the Department of State and the National Security Council and from meetings with the Director of the FBI prior to the first authorization of electronic surveillance on September 15, 1970, and these conversations with officials of the above-named agencies continued off and on until approximately March, 1971. The surveillances in question were authorized by the Attorney General after a determination was made by him that the activities of the JDL were obviously detrimental to the continued peaceful relations between the United States and the Soviet Union and threatened the President's ability and constitutional authority to conduct the foreign relations of this country.

On July 20, 1973, the district court entered its order denying the plaintiffs' motion for partial summary judgment and granting defendants' motion for summary judgment and dismissing the action. In its accompanying Findings of Fact and Conclusions of Law, the court below found that "[t]he activities of the JDL posed a threat to the continuance of our peaceful foreign relations with the Soviet Union and subjected

American citizens living in Moscow to harm by retaliation [and] [n]o prior authorization from a Court is necessary where, as in this case, electronic surveillances relate to the foreign aspect of our national security." The Court further stated that "[t]he electronic surveillances of JDL headquarters in New York City during the month of October, 1970 and January 5, 1971 to July 1, 1971 were a proper exercise of the President's constitutional authority to conduct the nation's foreign relations and his power to protect the national security" (*id.* at ¶ 1). The Court then concluded . . . that 18 U.S.C. §§ 2510-2520 has no application and cannot be invoked with respect to electronic surveillances conducted pursuant to the President's national security powers [and the] "[p]laintiffs' complaint and claim for damages pursuant to 18 U.S.C. § 2520 have no basis in the statute relied upon."

In that the district court concluded that the surveillance of the plaintiffs was lawful, it did not address itself to the three additional defenses raised by the defendants that (1) the decision in *United States* v. *United States District Court* [Keith], 407 U.S. 297 (1972) should not be applied retroactively, (2) that the plaintiffs' suit was barred by the doctrine of official immunity, and (3) that the defendants' actions were taken in the "good faith" belief that they were lawful and thus were not actionable.

The court of appeals, sitting *en banc,* reversed. A plurality of the court of appeals (Wright, Leventhal, Robinson, JJ. and Bazelon, C.J.) held that the JDL surveillances, while undertaken pursuant to the President's special responsibility for the conduct of the country's foreign affairs, were unconstitutional be-

cause the foreign security exception, if any, to the Fourth Amendment's warrant provision is limited to situations where the subject of the surveillance is either an agent of a foreign power or acting in collaboration with a foreign power.

A plurality of the court of appeals (Wright, Leventhal, Robinson, J.J., and Bazelon, C.J.) indicated that all national security surveillances which must comply with the warrant requirement of the Fourth Amendment, must also comply with most of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), since Congress intended the procedures and remedies of that statute to apply to all surveillance subjected by the courts to the warrant procedure.

A plurality of the court of appeals (Wright, Leventhal, Robinson, Robb, J.J.) indicated that the petitioner and his co-defendants could interpose a "good faith" defense consistent with *Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339 (C.A. 2, 1972).

Chief Judge Bazelon, in a concurring opinion, stated that he would have held that the petitioner does not have the right to interpose a "good faith" defense while the petitioner's co-defendants could avail themselves of that defense.

Judge McGowan, concurring in the judgment only, filed an opinion stating that the JDL surveillances were factually within the purview of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1972). Judge McGowan disagreed with the view of the plurality that all surveillances subject to the warrant requirement of the Constitution were also subject to the procedural requirements of the statute.

Judge Robb concurred in the result and in that part of the court's opinion which indicated that the defendants could interpose a "good faith" defense. In a separate opinion he stated his view that the matter was controlled by the principle of *United States* v. *United States District Court* [Keith], 407 U.S. 297 (1972).

Judge Wilkey concurred in the plurality's holding that the JDL surveillances, while undertaken pursuant to the President's foreign affairs powers, were nevertheless subject to the Fourth Amendment. However, dissenting in part, Judge Wilkey concluded that the procedures and remedies of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), had no application to foreign affairs surveillances.

Judge McKinnon joined in Judge Wilkey's opinion, with certain reservations.

None of the opinions addressed the issue, raised by the petitioner below, whether under the facts of this case he is by virtue of his former official capacity, immune from civil liability.

REASONS FOR GRANTING THE WRIT

Petitioner John N. Mitchell essentially adopts the reasons expressed by Malcolm J. Barrett, *et al.* in their petition for a writ of certiorari in this action, as follows:

It is the position of petitioner John N. Mitchell that a writ of certiorari should not be issued at this time because the decision below was not a final judgment, but simply remanded this case to the district court for a hearding to determine whether the petitioner and his co-defendants, F.B.I. agents, acted with the good faith belief that the surveillances were constitutional. It is submitted that a further development of the record in the district court with regard to the requests from the

State Department which led to the institution of these surveillances will demonstrate that these were, in fact, foreign intelligence surveillances which were not intended to provide evidence for criminal prosecutions. This further development of the record in the remand proceeding will provide a better basis for a review by this Court of the question of the constitutionality of these surveillances and the application of Title III to this activity.

If, however, this Court is disposed to grant the Zweibon petition, then it is respectfully submitted that the narrow issue of the scope of the good faith defense available to the petitioner John N. Mitchell under Title III can not be fairly assessed without consideration of the overriding questions of whether Congress intended the provisions of Title III to apply to this type of surveillance. This cross-petition is filed solely for the purpose of preserving those issues for review by this Court should it grant the Zweibon petition. See *Strunk* v. *United States,* 412 U.S. 434 (1973).

CONCLUSION

The petition for a writ of certiorari of Bertram Zweibon, *et al.* should be denied. If, however, that petition is granted, this petition should also be granted.

Respectfully submitted,

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Attorneys for Petitioner
John N. Mitchell

January 26, 1976

APPENDIX A

(Filed June 23, 1975)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 73-1847

Civil 2025-71

BERTRAM ZWEIBON, ET AL., *Appellants*

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States of America, ET AL.

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, *Chief Judge*, WRIGHT, MCGOWAN, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this case is hereby reversed and this case is hereby remanded to the District Court for proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

Date: June 23, 1975

Opinion for the court filed by Circuit Judge Wright, in which Judges Leventhal and Robinson concurred and in which Chief Judge Bazelon concurred except as to Part III-B, concerning which he filed an opinion dissenting in part. Circuit Judges McGowan and Robb filed opinions concurring in the judgment. Circuit Judge Wilkey filed an opinion concurring in part and dissenting in part. Circuit Judge McKinnon filed a dissenting opinion.

Test: HUGH F. KLINE, *Clerk*
United States Court of Appeals
for the District of Columbia
Circuit.

APPENDIX B

(Filed Aug. 29, 1975)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 73-1847

Civil 2025-71

BERTRAM ZWEIBON, ET AL., *Appellants*

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States of America, ET AL.

Before: BAZELON, *Chief Judge*, WRIGHT, McGOWAN, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

Order

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court *en banc* that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

HUGH E. KLINE, *Clerk*

By: ROBERT A. BONNER
Chief Deputy Clerk

see

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